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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 840

IB OTTO ASTRUP, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (A. 49) is reported at 432 F. 2d 438. The opinion of the district court (A. 43–47) is unreported.

JURISDICTION

The judgment of the court of appeals was entered July 8, 1970. Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to October 16, 1970. The petition was filed on October 12, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a resident alien who applied for and received an exemption from military service as an alien

on condition of permanent ineligibility for United States citizenship remained ineligible to become a citizen after he was later reclassified as available for military service but not required to serve because of physical unfitness.

STATUTES INVOLVED

Section 315(a) of the Immigration and Nationality Act, 66 Stat. 242, 8 U.S.C. 1426(a), provides:

> Notwithstanding the provisions of section 405(b) of this Act, any alien who applies or has applied for exemption or discharge from training or service in the Armed Forces or in the National Security Training Corps of the United States on the ground that he is an alien, and is or was relieved or discharged from such training or service on such ground, shall be permanently ineligible to become a citizen of the United States.

Section 101(a)(19) of the Immigration and Nationality Act, 66 Stat. 166, 8 U.S.C. 1101(a)(19) provides:

> As used in this chapter—
>
> * * * * *
>
> The term "ineligible to citizenship," when used in reference to any individual, means, notwithstanding the provisions of any treaties relating to military service, an individual who is, or was at any time, permanently debarred from becoming a citizen of the United States under section 3(a) of the Selective Training and Service Act of 1940, as amended (54 Stat. 885; 55 Stat. 844), or under section 4(a) of the Selective Service Act of 1948, as amended (62

Stat. 605; 65 Stat. 76), or under any section of this Act, or any other Act, or under any law amendatory of, supplementary to, or in substitution for, any of such sections or Acts.

Section 4(a) of the Selective Service Act of 1948, 62 Stat. 605, provided, in pertinent part:

> Except as otherwise provided in this title, every male citizen of the United States, and every male person residing in the United States * * * shall be liable for training and service in the armed forces of the United States. Any citizen of a foreign country, who is not deferrable or exempt from training and service under the provisions of this title (other than this subsection), shall be relieved from liability for training and service under this title if, prior to his induction into the armed forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President; but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States. * * *

STATEMENT

Petitioner is a native and citizen of Denmark, who entered the United States for permanent residence on February 20, 1950. On August 20, 1950, he registered for selective service and was thereafter classified I–A (available for military service) and ordered to report for induction. On October 11, 1950, petitioner was given a medical examination and found physically acceptable for military service (A. 8). On November 14, 1950, as the law then permitted, he filed an ap-

plication for exemption from military service on the ground of alienage, and his draft board thereupon reclassified him IV–C (alien not currently liable for military service) (A. 25–30).

In 1951, an amendment to the Selective Service Act eliminated the prior provision under which permanent resident aliens could apply for relief from military service. On August 6, 1952, petitioner was reclassified I–A, and was ordered to report for physical examination and induction on September 2, 1952. This time petitioner's medical examination showed that he was suffering from bursitis, and he was found not physically qualified for military service. Induction was therefore deferred for three months and on November 24, 1952, petitioner was classified V–A (over 26 years of age) (A. 9, 30–31, 36, 39).

On May 14, 1965, petitioner filed a petition for naturalization in the United States District Court at San Francisco, California (A. 4–5). At a hearing before a naturalization examiner on September 2, 1966 (A. 19 *et seq.*), petitioner testified that after his I-A classification in 1950 he sought the advice of the Danish consul, who explained the alternatives to him, and he thereafter filed the application for relief from military service (Form SSS 130) after he had "weighed the problem" (A. 26–27, 30). The form he signed read in part (A. 12–13):

> I hereby apply for relief from liability for training and service in the armed forces of the United States. I have read the NOTICE given below, and I understand that I will forever lose my rights to become a citizen of the United

States, and I may also be prohibited from entry into the United States or its territories or possessions as a result of filing this application.

The "NOTICE" referred to was as follows:

> Section 4(a) of the Selective Service Act of 1948, provides in part that "any citizen of a foreign country, who is not deferrable or exempt from training and service under the provisions of this title (other than this subsection), shall be relieved from liability for training and service under this title, if, prior to his induction into the armed forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President; but any person who makes such application *shall thereafter be debarred from becoming a citizen of the United States.*" Under other existing law, an alien who is not a permanent lawful resident of the United States at the time of execution of this application, thereafter becomes barred from ever making an entry for permanent residence into the United States, including Alaska, Hawaii, Puerto Rico, and the Virgin Islands, unless he enters as a minister of any religious denomination or as a professor of a college, academy, seminary, or university.

Petitioner testified that he had read and understood this Notice before signing the application (A. 28). The following colloquy appears in his statement (A. 29-30):

> Q. Then, is there any possibility that you did not understand that by signing this form you

> would be forever debarred from becoming a citizen of the United States?
>
> A. No, there was not.

In his statement to the designated naturalization examiner, petitioner also stated that he had applied for relief from military service primarily because he did not intend to remain permanently in the United States and planned to return to Denmark after a year or two (A. 28).

On July 16, 1968, petitioner appeared for a hearing before the district court, at which he was represented by counsel (A. 35 *et seq.*). He again testified that his chief reason for making the application for relief from military service in 1950 was his uncertainty whether he wished to remain in the United States (A. 36–38). He also stated that when he signed the application he understood that it would give him permanent deferment and that he would not have signed it if he had known that his deferment would not be permanent (A. 38).

The district court denied the petition for naturalization, (A. 43–47) and the court of appeals affirmed, observing that (A. 49):

> He made a considered decision initially to claim his alienage as a ground for avoiding military service. We believe the situation should be tested as of the time his claim was made.

SUMMARY OF ARGUMENT

I

Petitioner's application for an alien's exemption from military service was made in 1950, at which time

the Selective Service Act of 1948 was in effect. In *Ceballos* v. *Shaughnessy*, 352 U.S. 599, as here, the alien's exemption was later removed, and the alien was reclassified and ordered to report for induction, but failed to pass his medical examination. Nonetheless, this Court held that the language contained in the 1948 Act expressly directed that the making of such an application in itself debarred the alien from citizenship, and the ensuing circumstances did not remove the bar.

Petitioner contends, however, that since he applied for naturalization subsequent to the 1952 effective date of Section 315(a) of the Immigration and Nationality Act, his disqualification is removed by the more liberal test of ineligibility set forth in that statute. But here, as in *Ceballos*, the controlling date is not the date on which the petition for naturalization was made, but instead, the date on which petitioner applied for his alien's exemption. Indeed, Section 405(a) of the Immigration and Nationality Act states that "unless otherwise specifically provided", all "liabilities" arising under prior law shall continue in effect. Petitioner's debarment from citizenship under the 1948 Act is just such a pre-existing "liability". Since Section 315(a) does not contain a specific exception to the Section 405(a) savings clause, petitioner's liability is unaffected by the 1952 statute.

II

Even if the language of Section 315(a) were applicable to this case, petitioner nonetheless remains ineligible to become a citizen. Section 315 requires, in

addition to the making of an application, that the applicant for exemption "is or was relieved" from military service as a result of his application.

It has consistently been held under this statute that one who has subsequently been compelled to perform military service has not been effectively "relieved" from service within the meaning of Section 315. See, *e.g.*, *United States* v. *Hoellger*, 273 F. 2d 760 (C.A. 2). Petitioner argues that since draft-exempt aliens who actually serve in the military are not debarred from seeking citizenship, his debarment here is not the result of his having sought exempt draft status, but is, instead, the result of his failure to pass a physical examination. However, we interpret the language "is or was relieved" to mean that as long as the alien has not actually served in the armed forces, he remains ineligible for citizenship if he was relieved at any time on grounds of his alienage. The petitioner in this case was relieved from service for at least a year and a half solely on grounds of having sought an alien's exemption. Indeed, his alien's exemption appears to have been the major factor contributing to his permanent relief from service, because prior to seeking that exemption, petitioner had been examined and found physically fit for the draft. *Hoellger* and other cases dealing with exempt aliens who have actually served in the armed forces have specifically excluded from their holdings the situation in which the alien fails to pass his medical examination, on grounds that in these cases "(T)he physical disability may have arisen between the date the alien would have been inducted but for the obtaining of the exemption

and the subsequent date on which induction is ordered." 273 F. 2d at 763, n. 2. Every court of appeals which has directly considered the question involved here has distinguished the *Hoellger* line of decisions and agreed with our reading of Section 315.

We reject petitioner's contention that he was misled in his assumption that his alien's exemption would be permanent, and therefore that he cannot be held to the consequences of his waiver of eligibility for citizenship. The only support for the notion that petitioner was "misled" is his assertion that he did not realize that the exemption would later be removed by statutory amendment. We do not believe that petitioner's failure to predict future changes in the law has any bearing on whether he made a knowing waiver of his citizenship benefits.

We agree, however, that our reading of Section 315 produces a somewhat harsh result, for it is arguable that petitioner is being held here to his end of what might be regarded as a bargain, even though some of the consideration for that bargain has been taken away. Though we believe that there is support for such a result in the language of Section 315, this Court must assess the likelihood that Congress intended in these circumstances to hold petitioner strictly to his waiver.

Finally, petitioner's constitutional arguments are without merit. The condition imposed here with respect to naturalization—that the alien refrain from removing himself from the duty of performing military service—was fair and reasonable. Holding petitioner to his considered choice not to seek citizen-

ship is not in any way, as petitioner contends, a punitive measure inflicted on petitioner because of his failure to pass a physical examination.

ARGUMENT

I. BECAUSE PETITIONER APPLIED FOR RELIEF FROM MILITARY SERVICE BEFORE THE EFFECTIVE DATE OF THE IMMIGRATION AND NATIONALITY ACT OF 1952, HIS ELIGIBILITY FOR CITIZENSHIP IS DETERMINED BY SECTION 4(a) OF THE SELECTIVE SERVICE ACT OF 1948; THEREFORE, THE MAKING OF THE APPLICATION IN ITSELF DEBARRED PETITIONER FROM CITIZENSHIP

The conscription laws of this country since World War I have consistently subjected specified classes of aliens to compulsory service. In Section 2 of the Selective Draft Act of May 18, 1917, 40 Stat. 77-78, Congress imposed liability for military service on "male persons not alien enemies who have declared their intention to become citizens." This statute was amended by Section 1 of the Act of August 31, 1918, 40 Stat. 955, to provide that a neutral alien could obtain relief from military service by withdrawing his declaration of intention "and he shall forever be barred from becoming a citizen of the United States."

This pattern of relief from military service and consequent debarment from citizenship appears, in varying forms, in all subsequent selective service statutes. Thus, Section 3(a) of the Selective Training and Service Act of 1940, 54 Stat. 885, as amended by Sec. 2 of the Act of December 20, 1941, 55 Stat. 845, subjected to service all "male person[s] residing in the United States," but authorized an application by

a neutral alien for relief from military service, specifying that "any person who makes such application shall thereafter be debarred from becoming a citizen of the United States."[1]

The next major statute was the Selective Service Act of 1948. Section 4(a) of that statute, 62 Stat. 605–606, provided for registration and service by every citizen and "every other male person residing in the United States"; it authorized an application for relief from service by any citizen of a foreign country, specifying that "any person who makes such application shall thereafter be debarred from becoming a citizen of the United States."

This provision was amended by Section 1(d) of the Universal Military Training and Service Act of June 19, 1951, 65 Stat. 76, which made aliens admitted for permanent residence liable for service without any provision for exemption.[2] It is this provision that gives rise to the problem in this case.

Petitioner's application for relief from military service was made in 1950, when the Selective Service Act of 1948 was in effect. Under the express direc-

[1] In its original form, the 1940 Act, enacted before the United States became a belligerent, had no provision for relief of aliens from military service.

[2] The 1951 Amendment also imposed the military obligation on aliens who remained in the United States in excess of one year in a status other than that of permanent resident, but permitted those in this non-permanent group to apply for relief from military service: again, the amendment specified that "any alien who makes such application shall thereafter be debarred from becoming a citizen of the United States." This last formula has been retained in the selective service law since then, and is incorporated in 50 U.S.C. App. 454(a).

tion of Section 4(a) of that statute, the voluntary making of an application for relief from service in itself resulted in petitioner's debarment from citizenship. Indeed, this Court has expressly held that the making of the application is the act that triggers debarment from citizenship under the identical language of the 1941 Act. *Ceballos* v. *Shaughnessy*, 352 U.S. 599, 604. And as this Court has observed in *Moser* v. *United States*, 341 U.S. 41, 46:

> [A]s a matter of law, the statute imposed a valid condition on the claim of [an] * * * alien for exemption; petitioner had a choice of exemption and no citizenship, or no exemption and citizenship.

Nothing in the circumstances following petitioner's application avoids the consequence of his considered "choice of exemption and not citizenship". It is true that, as a permanent resident, he was thereafter reclassified as available for service after the 1951 amendment. Attorney General McGrath considered similar circumstances in *Matter of J*, 2 I&N Dec. 545, 552 (1947), involving a neutral alien who had applied for and had been granted relief from military service in 1943. In 1945, after his country became a cobelligerent, he was ordered to report for induction and was rejected as physically unfit. The Attorney General rejected the contention that the exemption claim had not received "complete and uninterrupted recognition", and found the alien ineligible for citizenship, observing:

> The language of the statute seems plain and I think the Congress intended that he should be bound by his election.

This Court confirmed the Attorney General's view of the statutory language in *Ceballos* v. *Shaughnessy, supra.* There an application for suspension of deportation was denied on the ground that the applicant was ineligible for citizenship, because he had obtained relief from military service as a neutral alien in 1943, and thus was disqualified from suspension.[2] His country became cobelligerent in November 1943, and in January 1944, five months after he applied for and obtained relief from military service, he was reclassified and ordered to report for induction, but was rejected as physically unfit. As we have noted, this Court found that the voluntary making of the application rendered Ceballos ineligible for citizenship, and that this debarment was not altered by the subsequent events. The Court observed, 352 U.S. at 605:

> The neutral alien in this country during the war was at liberty to refuse to bear arms to help us win the struggle, but the price he paid for his unwillingness was permanent debarment from United States citizenship.

Petitioner concedes that under the 1948 Act "[a]pplication and application alone was the significant event" (Pet. Br. 21). Petitioner contends, however, that since he applied for naturalization subsequent to the effective date—December 24, 1952—of

[2] The immigration law then in effect, unlike the present statute dealing with suspension of deportation, disqualified aliens ineligible for citizenship. See Section 244, Immigration and Nationality Act, 66 Stat. 214, as amended, 8 U.S.C. 1254. of Section 4(a) of the 1948 Act in *Ceballos* v. *Shaugh-*

Section 315(a) of the Immigration and Nationality Act, 8 U.S.C. 1426(a), his former disqualification has been removed by the more liberal "two-pronged" test of ineligibility set forth in that statute. (See *infra*, pp. 17–22.)

In *Ceballos*, supra, this Court found Section 315 of the 1952 Act inapplicable to a situation, such as here, in which the application for exemption giving rise to ineligibility for citizenship had been made prior to the effective date of that Act in December 1952. It is true that the Court in *Ceballos* relied on a specific saving clause, relating to pending applications for suspension of deportation, set forth in the last sentence of Section 405(a) of the Immigration and Nationality Act, 66 Stat. 280, 8 U.S.C. 1101 (note). But there is also a more general saving clause in the first sentence of Section 405(a), which states that "unless otherwise specifically provided," all pre-existing "conditions, rights, acts, things, liabilities, obligations, or matters" arising under prior law shall continue in effect. Petitioner's debarment from citizenship under the 1948 Selective Service law is just such a pre-existing "liability."

Although Section 315(a) of the Immigration and Nationality Act does deal generally with any alien "who applies or has applied for exemption," we submit that this is not a "specific" exception to the saving clause which would overcome the preservation of v. *Menasche*, 348 U.S. 528; *Shomberg* v. *United States*, 348 U.S. 540. As this Court stated in the *Menasche* case, which confirmed the view that Section 405(a) is a broad saving clause and should be broadly construed,

> The consistent broadening of the savings provision, particularly in its general terminology, indicates that this policy of preservation was intended to apply to matters both within and without the specific contemplation of Congress [p. 535].

Indeed, the only specific exception in Section 315 to the preservation of prior rights and liabilities is the opening clause, which directs that the section shall be effective, "notwithstanding the provisions of section 405(b)." Section 405(b) is a saving clause which relates only to petitions for naturalization under prior law pending when the 1952 Act became effective.[4] The limitation of this specific reference to Section 405(b) indicates that Congress intended Section 405(a) to be applicable with respect to the operation of Section 315. Cf. note 3 of Judge Waterman's opinion in *United States* v. *Hoellger, supra,* 273 F. 2d at 763. Our reading is also supported by the definition of ineligibility to citizenship in Section 101 (a)(19) of the Immigration and Naturalization Act,

[4] As this Court specifically held in *Menasche*, the reference in Section 405(b) to pending naturalization petitions does not exclude later filed petitions from the application of Section 405(a).

> As we read the statute, subsection (b) merely implements and emphasizes the operation of its forerunner. It is clear, first, that subsection (b) is not a specific exception of § 405(a), since *both* subsections state that prior law should apply in certain circumstances. The slight negative implication derived from the fact that § 405(b) applies to *pending* petitions for naturalization, and not to those filed after the effective date of the new Act, is overcome by the broad sweep of § 405(a), and its direction that prior law applies unless the Act "otherwise *specifically* provides." 348 U.S. at 536–537.

8 U.S.C. 1101(a)(19), which includes persons permanently debarred from citizenship under the 1940 and 1948 Selective Service Acts.

Since this Court's decision in *Ceballos*, a number of lower courts have considered which law is to be applied in regard to pre-existing disabilities. These courts have expressed differing views by way of dicta; in each instance the applicable statute was either assumed or conceded, and the decision rested on another ground. See *United States* v. *Hoellger*, 273 F. 2d 760, 763, n. 3 (C.A. 2); *Application of Mirzoeff*, 253 F. 2d 671, 672, 674 (C.A. 2); *Petition for Naturalization of Israel Mirzoeff*, 196 F. Supp. 230 (S.D.N.Y.); *In re Rego's Petition*, 289 F. 2d 174, 176 (C.A. 3); *United States* v. *Bazan*, 228 F. 2d 455 (C.A.D.C.); *Francisco Ballester Pons* v. *United States*, 220 F. 2d 399, 404–405 (C.A. 1), certiorari denied, 350 U.S. 830; see also *Jubran* v. *United States*, 255 F. 2d 81 (C.A. 5); *Gilligan* v. *Barton*, 265 F. 2d 904 (C.A. 8).

Here the issue is clearly presented. Petitioner's application for relief from military service was filed in November 1950; the statutory change making him liable for service was enacted in June 1951; his reclassification to I–A occurred in August 1952; he was found unqualified for service on physical grounds and deferred for three months in September 1952; and he was reclassified as over the age for service in November 1952. All of these events occurred prior to the effective date of the Immigration and Nationality Act on December 24, 1952. In light of the saving clause set forth in Section 405(a), we submit that Section 315(a) does not affect petitioner's permanent

disqualification which he incurred under prior law on account of his 1950 exemption application.

II. PETITIONER IS ALSO INELIGIBLE FOR CITIZENSHIP UNDER SECTION 315(a) OF THE IMMIGRATION AND NATIONALITY ACT

Even if the language of Section 315(a) were deemed to govern, we believe petitioner is nevertheless disqualified. The 1952 Act introduced into this section, as a condition for ineligibility to become a citizen, the additional requirement that the applicant for exemption "is or was relieved" from military service as the result of his application. To some extent this second condition has always been applied, since the disqualification has not attached when the request for relief from service was never honored. See *United States* v. *Bazan*, 228 F. 2d 455 (C.A.D.C.). Moreover, in some instances ineligibility for citizenship has been avoided when the application was improperly honored. See *McGrath* v. *Kristensen*, 340 U.S. 162; *In re Rego's Petition*, 289 F. 2d 174 (C.A. 3); contra: *Velasquez* v. *United States*, 241 F. 2d 126 (C.A. 2); *Jubran* v. *United States*, 255 F. 2d 81 (C.A. 5); *In re Skender's Petition*, 248 F. 2d 92 (C.A. 2), certiorari denied, 355 U.S. 931.

But there are no such complicating circumstances here. Petitioner's request for relief was properly honored, and he was actually relieved from military service. Nevertheless petitioner contends that his consequent relief from military service was temporary and that because of his reclassification to I–A in August 1952, followed by his rejection on physical grounds

in September 1952, he was not "effectively" relieved from military service on grounds of his alien's exemption, as contemplated by Section 315. In making this contention, petitioner relies especially on a series of decisions, following the lead of *United States* v. *Hoellger*, 273 F. 2d 760 (C.A. 2), which hold that one who has subsequently been compelled to perform military service has not been "effectively" relieved from such service within the meaning of Section 315. *Cannon* v. *United States*, 288 F. 2d 269 (C.A. 2); *United States* v. *Lacher*, 299 F. 2d 919 (C.A. 9); *In re Rego's Petition*, 289 F. 2d 174 (C.A. 3).

In connection with the *Hoellger* line of cases, petitioner argues that since draft-exempt aliens who actually serve in the armed forces are, by force of judicial decision, not debarred from seeking citizenship, petitioner's debarment would be in effect not because of his having sought exempt draft status, but because of his failure to pass a physical examination. Though we find some appeal in this argument, we believe that there is an adequate answer to it. Section 315(a) refers to an alien who *"is or was* relieved" from service on grounds of his alienage (emphasis supplied). It is by no means clear from the language of Section 315 that the alien must be relieved solely and permanently on grounds of his alienage. In fact, the language "is or was relieved" may well mean that as long as the alien has not actually served in the armed forces, he is ineligible for citizenship if he was relieved *at any time* on grounds of his alienage. In other words, the alien's effective relief from the draft may have been the result of more than one ground for

exemption, each relieving the alien for part of the time in which he would otherwise have been required to serve. As long as the alien's exemption was one of the grounds contributing to his effective relief, he has been "relieved * * * on such ground" within the meaning of Section 315. This reading of Section 315 would clearly debar the petitioner in this case from becoming a citizen, since he was relieved from service for more than a year and a half on grounds of having sought an alien's exemption from the draft.

Indeed, the *Hoellger* decision expressly limited its impact to one "who has actually served in the Armed Forces under compulsion of the executive branch" (273 F. 2d at 762), and declared that it would be inapplicable to one who had not actually served. The court stated, *id.* at 763, n. 2:

> An alien who postpones induction by means of an application for exemption, and who is thereafter rejected for physical disability, may legitimately be said to have been relieved from military service by virtue of his exemption application. This results from the fact that the physical disability may have arisen between the date the alien would have been inducted but for the obtaining of the exemption and the subsequent date on which induction is ordered.[8]

[8] Similarly, temporary relief resulting from the alien's exemption could have resulted in an alien's being over draft age after that exemption has been removed. In the instant case, for example, had petitioner's second physical examination been scheduled three months later, he would have been ineligible for the draft, regardless of whether he passed the examination, by virtue of having reached his twenty-sixth birthday (A. 9). It seems, in fact, that because of the proximity of petitioner's twenty-sixth birthday, the draft board did not even bother to

Judge Waterman's reasoning could well apply to the instant case since, prior to receiving his alien's exemption, petitioner had been examined and found physically fit for the draft (supra, p. 3). Though it cannot be said with certainty that petitioner's bursitis developed between his first and second examinations, this appears at least to be a strong possibility. In any event, the significant factor is that petitioner was found physically fit at his first examination, and, had he not sought an alien's exemption, would presumably have served in the military at that time. Under these circumstances, it can reasonably be said that petitioner's alienage was the major factor contributing to his permanent relief from military service.

Other cases holding that a person inducted into military service was not effectively relieved from such service have also based their holdings on the fact that military service was actually performed. In no instance has any appellate court ruled that subsequent availability to service, without actual service, removed the disqualification. In fact, every appellate court which has thus far directly confronted the issue has ruled that the I–A reclassification of a disqualified applicant, followed by his rejection as physically unfit, produced no change in his ineligibility for citizenship. *Lapenieks* v. *Immigration and Naturalization*

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give him a formal classification of IV–F (physically unfit), but merely deferred his reclassification for three months so that he could be classified V–A (over 26 years of age) (A. 9). Surely, the fact that an alien's age relieved him from service after the change in the law should not excuse him from the consequences of the election that kept him from service during the period when he would otherwise have been eligible.

Service, 389 F. 2d 343 (C.A. 9), certiorari denied, 391 U.S. 951; *In re naturalization of Cuozzo,* 235 F. 2d 184 (C.A. 3); *United States* v. *Kenny,* 247 F. 2d 139 (C.A. 2). See also *Ceballos* v. *Shaughnessy, supra.* Moreover, the courts have found that the applicant's ineligibility has not been altered by his reclassification to I-A followed by avoidance of actual induction for other reasons. *Gilligan* v. *Barton,* 265 F. 2d 904 (C.A. 8) (over age); *Jubran* v. *United States,* 255 F. 2d 81 (C.A. 5) (occupational deferment).[4]

The district court decisions cited by petitioner are distinguishable. *In re Wendt,* 300 F. Supp. 725 (N.D. Ill.), and *In re Kadich,* 221 F. Supp. 353 (S.D.N.Y.), involved situations where the applications for relief from service were erroneously accepted at a time when the applicant was no longer subject to service. *Petition of Caputo,* 118 F. Supp. 870 (E.D.N.Y.), dealt with an enemy alien who was not liable for military service under the expresss language of the 1918 Act (see p. 10 *supra*). In none of these cases could it be said that the applicant had been relieved from military service for any period of time whatsoever by virtue of the alien's exemption. Finally, the records were unclear in *In re Petition for Naturalization of*

[4] Subsequent efforts to withdraw an application for exemption have been unsuccessful. *Giz* v. *Brownell,* 240 F. 2d 25 (C.A.D.C.); *Machado* v. *McGrath,* 193 F. 2d 706 (C.A.D.C.), certiorari denied, 342 U.S. 948. Cf. *United States* v. *Bazan,* 228 F. 2d 455.

Fabbri, 254 F. Supp. 858 (E.D. Mich.), and it was not certain whether the application for relief had been honored.[7]

Petitioner also argues that he cannot be held to the consequences of his waiver of eligibility for citizenship because, in making that waiver, he was misled in his assumption that his alien's exemption from the draft would be permanent. In support of this argument, petitioner cites the *Moser* case, *supra*, in which this Court removed an alien's debarment from citizenship on grounds that he had been misled by the Swiss embassy and the United States State Department into thinking that he could apply for a draft exemption without giving up his right to seek citizenship. Petitioner does not claim that anyone withheld information from him or supplied him with incorrect information at the time of his application for exemption from the draft. Indeed, in his statement before the naturalization examiner petitioner declared that there was "no possibility" that he did not understand that by signing the application he would be forever debarred from becoming a citizen of the United States (A. 29–30). Petitioner merely claims that he was not able to foresee the subsequent legislative developments that would threaten his exemption from the draft. We do not believe that petitioner's failure to predict future changes in the law has any bearing on the question whether his waiver of citizen-

[7] *Petition of Kohl*, 146 F. 2d 347 (C.A. 2), is also inapposite, since it involved no application for relief from military service as an alien, and concerned only the loyalty of the alien in the light of his requests for deferment.

ship benefits was knowingly made within the meaning of the *Moser* decision.

Although we do not believe that petitioner can successfully invoke the "elementary fairness" doctrine referred to by this Court in *Moser*, we agree that our reading of Section 315(a) produces a somewhat harsh result. For although petitioner was for a time relieved from military service under his application for an alien exemption in which he knowingly relinquished any claim to citizenship, it is true that he unexpectedly lost the continuing assurance of exemption for which he made that relinquishment. And although we do not believe that petitioner should be relieved from the consequences of his choice merely by virtue of subsequent statutory changes which neither he nor anyone else could foresee, it is undoubtedly true that petitioner's election in 1950 was affected by the statutory scheme then in effect. When the government modified its part of that arrangement by actually calling petitioner for service after the repeal of the statute in 1951—as it undoubtedly had power to do—it is not altogether clear that Congress intended, nonetheless, for petitioner's part of the arrangement—his permanent debarment from citizenship—to continue. Though we find in the statutory language evidence that Congress did intend to hold petitioner strictly to his election, we agree that the language is not entirely conclusive, and that in resolving any ambiguity in the language of Section 315(a), this Court must assess the likelihood that Congress intended to hold petitioner to his end of what might be regarded as a bargain—although there was clearly

no "contract"—after some of the consideration was subsequently taken away.[8]

We note, finally, that petitioner's constitutional arguments are without merit. Primarily they appear to rest on the misconception that our reading of the statute disqualifies petitioner from citizenship because of his inability to pass a physical examination. This is not so. His disqualification results from his voluntary and knowing application for relief from military service, and encompasses all who have made such applications and who have thereby avoided military service.

Nor can it be doubted that Congress is empowered to impose such a condition on naturalized citizenship. It has frequently been stated that naturalization is a privilege, "to be given, qualified or withheld as Congress may determine." *United States* v. *Macintosh*, 283 U.S. 605, 615.[9] Moreover, this Court has noted that the right to acquire citizenship "is purely statutory" (*Zartarian* v. *Billings*, 204 U.S. 170, 175), and that "No alien has the slightest right to naturalization unless all statutory requirements are complied with * * *" (*United States* v. *Ginsberg*, 243 U.S. 472, 475). Therefore there must be strict compliance with the conditions imposed by Congress. *Maney* v. *United States*, 278 U.S. 17, 22;

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[8] Of course, this assessment of intent would not be necessary if the Court accepts our view that it is not Section 315(a) but the preexisting 1948 draft law that determines petitioner's rights. The harshness of the latter law was accepted by this Court in *Ceballos*, *supra*.

[9] Overruled on other grounds, *Girouard* v. *United States*, 328 U.S. 61.

Johannessen v. *United States,* 225 U.S. 227, 240. And it is settled that the burden is on the applicant to establish such compliance and that doubts are to be resolved in favor of the United States and against the claimant. *Berenyi* v. *District Director,* 385 U.S. 630, 637. Although the above authorities indicate that the power of Congress to impose conditions on the attainment of naturalization is quite broad, we do not contend that it is unlimited. However, the condition imposed in the instant case—that the alien refrain from removing himself from the duty of performing military service, a duty incumbent on all citizens—was both fair and reasonable.

Finally, the attempt to characterize the disqualification as punitive, and thereby violative of the cruel and unusual punishment clause of the Eighth Amendment, is unpersuasive. There is no evidence of any such punitive intent. On the contrary, the disqualification is the anticipated consequence of a knowing and considered choice between clear alternatives. As this Court has declared, "the statute imposed a valid condition on the claim of [an] * * * alien for exemption; petitioner had a choice of exemption and no citizenship, or no exemption and citizenship." *Moser* v. *United States,* 341 U.S. 41, 46.

CONCLUSION

For the reasons stated herein, it is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

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